STATE OF MICHIGAN

COURT OF APPEALS

LAURA DOUGLAS, Plaintiff-Appellee,	UNPUBLISHED June 6, 2013
v	No. 306231 Wayne Circuit Court
FORD MOTOR COMPANY, Defendant-Appellant.	LC No. 09-022200-CD

Before: CAVANAGH, P.J., and SAAD and RIORDAN, JJ.

PER CURIAM.

Defendant, Ford Motor Company, appeals the trial court's order that denied its motion for summary disposition. For the reasons set forth below, we reverse.

Defendant claims the trial court should have granted its motion for summary disposition on plaintiff's claims of discrimination, hostile work environment, and retaliation. As this Court explained in *Maple Grove Twp v Misteguay Creek Intercounty Drain Bd*, 298 Mich App 200, 206-207; 828 NW2d 459 (2012):

> We review de novo a trial court's decision on a motion for summary disposition. *Oliver v Smith*, 290 Mich App 678, 683; 810 NW2d 57 (2010). A motion under "MCR 2.116(C)(8) tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted." *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition under subrule (C)(8) is appropriate "if no factual development could justify the plaintiffs' claim for relief." *Id.* A motion for summary disposition under MCR 2.116(C)(10) "tests the factual support of a plaintiff's claim." *Id.* In reviewing a motion under subrule (C)(10), we consider "the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004).

Plaintiff asserts that, while employed by defendant, she endured ongoing racial and gender discrimination, pregnancy discrimination, and retaliation. She further claims that she was subjected to a hostile work environment because of her race. MCL 37.2202 provides, in relevant part:

(1) An employer shall not do any of the following:

(a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.

(b) Limit, segregate, or classify an employee or applicant for employment in a way that deprives or tends to deprive the employee or applicant of an employment opportunity, or otherwise adversely affects the status of an employee or applicant because of religion, race, color, national origin, age, sex, height, weight, or marital status.

(c) Segregate, classify, or otherwise discriminate against a person on the basis of sex with respect to a term, condition, or privilege of employment, including, but not limited to, a benefit plan or system.

(d) Treat an individual affected by pregnancy, childbirth, or a related medical condition differently for any employment-related purpose from another individual who is not so affected but similar in ability or inability to work, without regard to the source of any condition affecting the other individual's ability or inability to work. . . .

I. HOSTILE WORK ENVIRONMENT

"[T]he purpose of the [CRA] is to combat serious demeaning and degrading conduct . . . in the work place. . . ." *Radtke v Everett*, 442 Mich 368, 387; 501 NW2d 155 (1993). To establish a prima facie case of hostile work environment based on race, an employee is required to demonstrate:

(1) the employee belonged to a protected group;

(2) the employee was subjected to communication or conduct on the basis of [race];

(3) the employee was subjected to unwelcome [racial] conduct or communication;

(4) the unwelcome [racial] conduct or communication was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and

(5) respondeat superior. [*Haynie v State*, 468 Mich 302, 307-308; 664 NW2d 129 (2003), citing *Radtke*, 442 Mich at 382-383.]

"[A] hostile work environment claim is actionable when the work environment is so tainted that, in the totality of the circumstances, a reasonable person in the plaintiff's position would have perceived the conduct at issue as substantially interfering with employment or having the purpose or effect of creating an intimidating, hostile, or offensive employment environment."

Radtke, 442 Mich at 372. "[E]mployers are vicariously liable when a supervisor victimizes a subordinate by creating a hostile work environment." *Hamed v Wayne Co*, 490 Mich 1, 19; 803 NW2d 237 (2011) (citation omitted). "An employer may avoid liability . . . if it adequately investigated and took prompt and appropriate remedial action upon notice of the alleged hostile work environment." *Downer v Detroit Receiving Hosp*, 191 Mich App 232, 234; 477 NW2d 146 (1991). To survive a motion for summary disposition, a plaintiff must present documentary evidence showing the existence of a genuine issue of material fact regarding "whether a reasonable person would find, under the totality of the circumstances, [that the] comments [or conduct as alleged] were sufficiently severe or pervasive to create a hostile work environment." *Quinto v Cross & Peters Co*, 451 Mich 358, 369; 547 NW2d 314 (1996).

The parties do not dispute that plaintiff, as a woman and an African-American, is part of a protected group. *Haynie*, 468 Mich at 307. Contrary to the findings of the trial court, plaintiff's allegations and proffered evidence failed to establish that she was subjected to communication or conduct premised on her race that was intended to and did interfere with her employment. *Id.* at 307-308.

Vague assertions and suppositions do not establish a prima facie case of hostile work environment premised on race. See, e.g., *Quinto*, 451 Mich at 370-371. Plaintiff's allegations of unfair treatment focus on criticism of her job performance. Further, plaintiff's claims regarding "racially based" negative comments are notable for the total absence of any racial content. Specifically, plaintiff alleged that, on her first day of work as a production supervisor, two white male employees stated, "No way" and began laughing. Plaintiff claims that her lower performance rating of "satisfactory" in 2006 was unfair and racially motivated because a white male production supervisor, who held the position for a shorter time than plaintiff, received a higher performance rating. Plaintiff complains that she was disciplined, counseled or "yelled at" when problems occurred on her production line that resulted in shut downs and unit losses, but asserts, without providing any evidence, that white production supervisors were not disciplined for shut downs that occurred on their lines for similar reasons or when equivalent losses occurred. Plaintiff claims this was racially motivated, despite the absence of any use of language that would imply the incidents involved race. Though she asserts that James Kennedy, a white male who worked as a Manufacturing Planning Specialist, and Roderick Gray, an African-American male who served as her superintendant, addressed her in a "demeaning and insulting manner," but she does not suggest that their remarks to her included inappropriate racial comments or slurs.

Plaintiff cites only two comments that have anything to do with race, but neither supports her claim. On May 9, 2007, Kennedy told plaintiff to leave the production floor and to go on medical like "you people" always do. Plaintiff acknowledged that, just before Kennedy's comment, she stated she was going to find her Employee Support Services Program representative. While plaintiff alleges that Kennedy's remark was racially tinged or motivated, it is equally probable that the comment was not racial in nature, but rather a reference to employees who utilize the support services program. Moreover, if Kennedy's comment involved race, it does not constitute evidence that discrimination was so severe or pervasive that it would substantially interfere with plaintiff's work environment. *Radtke*, 442 Mich at 372.

Plaintiff claims Gray made racial comments, but plaintiff did not hear them, she offered no evidence from anyone who did, and the statements are inadmissible hearsay. According to plaintiff, a fellow-employee, Linda McBride, told her that Gray "has a problem with [plaintiff] being married to a white man," and that Gray referred to plaintiff's husband as a "dirty hillbilly" and "white trash." Plaintiff further alleged that McBride told her that Gray referred to plaintiff's infant as a "beige baby." Plaintiff concedes that Gray never made any comments directly to her or in her presence. While such comments are racial in nature and highly offensive, plaintiff did not offer any testimony or affidavits to support her claim. Further, plaintiff offers the remarks to demonstrate the truth of the matter asserted – that Gray was racially biased against her and that he engaged in behavior or conduct that resulted in a hostile work environment. As this Court ruled in *SSC Assoc Ltd Partnership v Gen Retirement Sys of the City of Detroit*, 192 Mich App 360, 364; 480 NW2d 275 (1991), when opposing a motion for summary disposition, "[o]pinions, conclusionary denials, unsworn averments, and *inadmissible hearsay* do not satisfy the court rule; disputed fact (or lack of it) must be established by admissible evidence." (Emphasis added). Further, the comments were primarily directed at plaintiff's husband and do not directly evidence racial animus toward plaintiff. Moreover, "the sporadic use of abusive language [or] gender-related jokes" is not actionable. *Faragher v City of Boca Raton*, 524 US 775, 788; 118 S Ct 2275; 141 L Ed 2d 662 (1998) (internal quotation omitted).

Plaintiff's claim of a hostile work environment suffers from an additional deficiency. A plaintiff is required to demonstrate that either a recurring problem existed or a repetition of an offending incident was likely and the employer failed to rectify the problem after adequate notice. *Radtke*, 442 Mich at 382. Notice of harassment sufficient to impute liability to the employer exists if, "by an objective standard, the totality of the circumstances were such that a reasonable employer would have been aware of the substantial probability that . . . harassment was occurring." *Chambers v Trettco, Inc*, 463 Mich 297, 319; 614 NW2d 910 (2000). Plaintiff repeatedly acknowledges that, despite her claims in this litigation, she did not report the incidents to defendant. When plaintiff did voice complaints, her allegations implied unfair treatment, but not racial bias.

Regarding plaintiff's claim that Kennedy told plaintiff to leave the production floor, plaintiff does not dispute that defendant addressed the situation. Specifically, Pamela Siegwald discussed the incident with plaintiff, Kennedy, and Gray. Siegwald testified that the matter involved performance issues and was resolved:

> Because we brought Laura and Jim together. I brought them together in the room, and we discussed all of the issues that were discussed, and both parties were happy with the discussion.

In addition, Sherrie Winfield became involved as an organization and personnel planning associate in human resources for salaried employees. Winfield participated in the investigation and resolved the issue by speaking with the parties involved, she directed Gray not to permit plaintiff's removal from the production floor, she arranged for regular sessions involving the parties, and directed Siegwald to address concerns. While plaintiff may have been personally dissatisfied with the response by defendant, she cannot demonstrate a failure by defendant to address the incident. Importantly, the incident was related to a production issue and an alleged

problem with plaintiff's performance. She does not intimate that the incident involved any direct evidence of racial discrimination.

Because plaintiff failed to proffer any evidence of a hostile work environment caused by racial animus or that defendant was on notice of plaintiff's concerns and failed to act on them, the trial court erred in failing to dismiss plaintiff's claim of hostile work environment premised on racial discrimination.

II. DISCRIMINATION BASED ON PREGNANCY

The CRA prohibits employers from discriminating against employees on the basis of pregnancy. MCL 37.2201(d); MCL 37.2202(1); *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 132; 666 NW2d 186 (2003). Proof of discrimination may be by direct or indirect evidence. *Id*. at 132. Direct evidence of discrimination is "evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Id*. at 133 (internal quotation marks and citations omitted). In the absence of direct evidence of discrimination, a plaintiff must provide indirect evidence sufficient to create a question of fact regarding her claim of discrimination. Indirect evidence necessitates proof that (a) the plaintiff was a member of a protected class; (b) she was the recipient of an adverse employment decision or action; (c) the plaintiff was qualified for the position; and (d) the circumstances involved in the change of her employment status permit an inference of discrimination. *Id.* at 134.

Our Supreme Court has distinguished between behavior or conduct that constitutes sexual harassment and discrimination based on pregnancy. Specifically, the Court has "recognized that discrimination on the basis of a woman's pregnancy and sexual harassment are two subsets of sex discrimination," and it has subsequently rejected the concept that "harassment on the basis of a woman's pregnancy is sexual harassment." *Haynie*, 468 Mich at 310 (citations omitted). Specifically:

> Pregnancy discrimination is sex discrimination, but it is not sexual harassment. In order to prove pregnancy discrimination, one must show that the employer discriminated against the employee on the basis of a pregnancy. However, in order for one to prove sexual harassment, one must show that there was either "unwelcome sexual advances, requests for sexual favors, [or] other verbal or physical conduct or communication of a sexual nature. . . ." MCL § 37.2103(*i*). Accordingly, pregnancy discrimination and sexual harassment consist of substantially different elements, and thus a person asserting a claim of sexual harassment must prove something considerably different from a person asserting a claim of pregnancy discrimination. [*Id.* at 311 (footnote omitted).]

Plaintiff presented insufficient evidence to show that defendant engaged in discrimination on the basis of her pregnancy. Plaintiff maintains that defendant acted unfairly by requiring her to continue working as a production supervisor because of her medical restrictions. She acknowledges that Siegwald provided her with information about defendant's maternity leave policy, and plaintiff does not contend that she was denied maternity leave. Plaintiff also concedes that some of her medical restrictions were not provided to defendant until late

September 2007. And, when defendant received notice of plaintiff's medical restrictions that would limit physical abilities, defendant assigned plaintiff to desk work.

Plaintiff claims that her discussions with Rebecca Pennill, a supervisor in the body shop who was also pregnant, led to her belief that it was unfair to require plaintiff to continue to work as a production supervisor while pregnant. Ultimately, plaintiff's only assertion was that she spoke frequently with Pennill "and just how she was being treated versus how I was being treated . . . it was really upsetting to me to see this." Yet plaintiff does not address whether her situation was similar to that of Pennill, if they had the same medical restrictions, job responsibilities, or due dates, and plaintiff does not proffer any evidence in the form of testimony or an affidavit from Pennill to support her allegations.

Plaintiff alleges Siegwald provided her incorrect information on defendant's maternity leave policy, which resulted in a loss of pay, but she acknowledges that the policy changed during this timeframe and that, ultimately, she was paid for her maternity leave and did not incur any financial loss. Further, after her maternity leave, plaintiff returned to defendant as a production supervisor at the same rate of pay. Plaintiff claims that, though her pregnancy prevented her from quickly reaching certain areas of the production line, Kennedy commented that she needed to perform her job despite her pregnancy, or she must obtain medical restrictions or a leave following a stop in production. Kennedy's comment is not discriminatory and merely reflects defendant's policies. Furthermore, plaintiff failed to explain or to demonstrate any nexus between her pregnancy and her termination, which occurred seven to eight months after she returned to work from her maternity leave without any decrease in her position or pay rate. As a result, the trial court erred in failing to dismiss plaintiff's claim of pregnancy discrimination.

III. RACIAL DISCRIMINATION

Plaintiff also contends that she was the victim of racial discrimination by defendant. Claims that present direct evidence of racial animus are referred to as "mixed motive" or "intentional discrimination" claims. *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 360; 597 NW2d 250 (1999). In such cases, the plaintiff must demonstrate: (1) that she is a member of a protected class, (2) an adverse employment action, (3) that the employer was predisposed to discriminating against members of the plaintiff's protected class, and (4) that the employer actually acted on that predisposition in taking the adverse employment action with regard to the plaintiff. *Id*. at 360-361. When a plaintiff has provided direct evidence of discrimination, it is generally the job of the fact-finder to weigh the evidence concerning the defendant's motivation, the meaning of any discriminatory remarks, or the credibility of evidence. *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001). A defendant may, however, avoid a finding of liability by showing that it would have taken the same action or made the same decision even without consideration of the protected characteristic. *Harrison v Olde Fin Corp*, 225 Mich App 601, 613; 572 NW2d 679 (1997).

As discussed in conjunction with plaintiff's claim of a hostile work environment premised on race, plaintiff presented insufficient direct evidence to support her separate claim of racial discrimination. Plaintiff's reference to a vague comment by Kennedy involving the words "you people" cannot be construed as evidencing racial animus, particularly in the context and

circumstances in which he made the statement. Plaintiff's only other direct evidence of racial animus was premised on inadmissible hearsay involving Gray. While Gray's purported comments are racially-tinged, they were not spoken to or directly overheard by plaintiff, and were merely assertions by third parties of statements allegedly made by Gray. Because plaintiff did not establish a prima facie case of racial discrimination, a burden-shifting analysis applies.

When there is no direct evidence of racial discrimination, the four-step test announced in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973), is applied to determine whether the plaintiff has established a viable employment discrimination case under the CRA. *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001). To establish a prima facie case of discrimination, a plaintiff must show that: (1) she belonged to a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position that she held, and (4) she was discharged under circumstances which give rise to an inference of unlawful discrimination. *Id*. at 463. "The burden then shifts to the defendant [employer] to articulate a legitimate, nondiscriminatory reason for the plaintiff's termination to overcome . . . the presumption." *Lytle v Malady (On Rehearing)*, 458 Mich 153, 173; 579 NW2d 906 (1998); *Hazle*, 464 Mich at 464. If the employer advances such a reason, the plaintiff has the burden of proving by a preponderance of the evidence that the reason offered by the employer is merely a pretext for impermissible discrimination. *Hazle*, 464 Mich at 466; *Lytle*, 458 Mich at 173-174; *Barnell v Taubman*, 203 Mich App 110, 121-122; 512 NW2d 13 (1993). Thus, even if the plaintiff circumstantially establishes a prima facie case of racial discrimination, and the defendant proffers evidence of non-discriminatory reasons for its actions, the plaintiff must produce direct or circumstantial evidence "sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff." *Lytle*, 458 Mich at 175-176.

Pretext may be established in three different ways: (1) by showing that the defendant's articulated reasons had no basis in fact; (2) by showing that the proffered reasons were not the actual factors motivating the adverse employment decision; or (3) by showing that the proffered reasons were insufficient to justify the adverse action. *Feick v Monroe Co*, 229 Mich App 335, 343; 582 NW2d 207 (1998). Michigan courts have adopted an "intermediate position" as the proper standard for determining pretext.

> Under this position, disproof of an employer's articulated reason for an adverse employment decision defeats summary disposition only if such disproof also raises a triable issue that discriminatory animus was a motivating factor underlying the employer's adverse action. In other words, plaintiff must not merely raise a triable issue that the employer's proffered reason was pretextual, but that it was a pretext for . . . discrimination. [*Lytle*, 458 Mich at 175-176.]

Defendant contends that economic factors necessitated the reduction in work force that resulted in plaintiff's termination and the severance of an employment relationship with a large number of its employees, including but not limited to nine other production supervisors at plaintiff's work site. Plaintiff does not challenge the existence of "financial problems in the auto industry," only that her selection as one of the employees terminated was motivated by discriminatory factors.

Although plaintiff contends that her claim of discrimination is not premised on mere numbers, her contention that African-American and female employees were heavily and disproportionately targeted in the reduction in work force is not substantiated by actual data. Defendant released 10 of its 38 production supervisors at plaintiff's work site in addition to numerous other employees. The percentage or ratio of African-American and female production supervisors did not vary between the pre-reduction and post-reduction levels. In addition, all testimony supports defendant's assertion that race and gender were not factors considered in the selection of the employees to be terminated. Plaintiff does not dispute that defendant's mechanism for selecting individuals for separation involved a multi-step process, including: (a) an initial determination of the number of employees that must be eliminated based on organizational need and function, (b) ranking of employees based on their contribution assessment ratings, (c) seniority, and, if necessary (d) random selection by social security number when all other factors are equivalent. As a procedure, plaintiff does not dispute that the described selection methodology is both gender and racially neutral. Plaintiff's assertion that defendant should have considered an employee's level of education and specific certifications is unavailing. Defendant is not required to agree with plaintiff regarding the qualifications or criteria deemed relevant in making a business decision. As discussed in *Hazle*, 464 Mich at 476 (citation omitted):

> "[T]he plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent."
>
> The only requirement is that, "when evaluating its employees, employers are to evaluate them on the basis of their merits, in conjunction with the nature of their businesses at the time of the evaluation, and not on the basis of any discriminatory criterion."

Plaintiff argues that her "contribution assessment" was impacted by the discriminatory animus of Kennedy and Gray as the people responsible for her ranking and, thus, resulted in her lower rating and placement in the pool of people targeted for elimination. However, plaintiff's claim is not consistent with the evidence. Plaintiff received a performance evaluation from Bernard Stewart with an overall rating of "excellent" in 2006, after three months as a production supervisor. He also identified several deficiencies involving plaintiff's ability to plan and anticipate needs, evaluate information, her decision making, and her level of knowledge. Safety issues were also identified as a concern in addition to production losses. Plaintiff wrote an extensive note in response to this evaluation, in which she implied her acceptance of the criticism and acknowledged that she engaged in behavior that caused significant problems. Similar issues were addressed in plaintiff's interim evaluation in August of 2006.

Plaintiff's superintendant Marisela Reyes, a Hispanic female, gave plaintiff her first "satisfactory" rating in December of 2006. Reyes documented various performance issues and plaintiff wrote on her review that she appreciated Reyes's efforts to "improve [her] performance." Reyes was so concerned about plaintiff's deficiencies that she scheduled weekly meetings with plaintiff and Siegwald to address the problems. Similar problems were documented in plaintiff's next interim review.

Jack Spitza, who also served as plaintiff's superintendent, also expressed concerns about plaintiff's job performance. In his interim evaluation of plaintiff, Spitza gave her an overall rating of "satisfactory plus," but stated that plaintiff did "not perform well as a supervisor." While Spitza did not invoke formal discipline, he testified that he spoke to plaintiff "many times regarding performance and issues that she was having at work." Spitza stated that plaintiff failed to hold her employees "accountable" and "was constantly making poor decisions around safety and quality and the delivery of the vehicle." Siegwald echoed these concerns about plaintiff's performance.

It appears that plaintiff's discrimination claim centers on the evaluation completed by Gray and counseling she received about her poor job performance while Gray was her superintendant. However, plaintiff does not challenge as untrue the assertions by Gray or others regarding product losses and the repeated shut downs of her line, despite her claim that the problems were not her fault or responsibility. Indeed, plaintiff acknowledges that Reyes also rated her performance as merely "satisfactory" and that Reyes disciplined her, but plaintiff did not dispute Reyes's evaluation and, indeed, stated that "Mari has a plan to improve my performance and I am glad." Plaintiff merely asserts, without support, that she was treated more harshly than other production supervisors who made similar mistakes, and she has not shown that racial animus led to her dismissal. Accordingly, the trial court should have granted summary disposition to defendant on plaintiff's claim of racial discrimination.

IV. GENDER DISCRIMINATION

The trial court also should have dismissed plaintiff's claim of gender discrimination. To establish a prima facie case of gender discrimination, a plaintiff may present direct evidence that his or her employer took an adverse employment action on the basis of her gender. *Hazle*, 464 Mich at 462. If the plaintiff cannot submit direct evidence that the employer's decision was motivated by gender, the plaintiff may establish a prima facie case through indirect evidence. Using the indirect method, the plaintiff must present evidence from which a finder of fact could infer that the plaintiff was a victim of unlawful discrimination using the burden shifting approach established in *McDonnell Douglas*. See *Hazle*, 464 Mich at 462. Using this method, the plaintiff must present evidence that she (1) belongs to a protected class, (2) suffered an adverse employment action, (3) was qualified for the position, and (4) the action was taken under circumstances giving rise to an inference of unlawful discrimination. *Id*. at 463.

Once the plaintiff presents sufficient evidence to establish a prima facie case under the indirect approach, a presumption of discrimination arises. *Id*. The presumption arises because it is presumed that the adverse action, "if otherwise unexplained, [was] more likely than not based on the consideration of impermissible factors." *Id*. But this presumption is rebuttable. If an employer is able to demonstrate that the adverse employment action "was taken for a legitimate, nondiscriminatory reason," the presumption created by the prima facie case is eliminated. *Id*. at 464-465. At this juncture, the plaintiff must present evidence from which the finder of fact could infer that the proffered reason constituted a mere pretext for the unlawful discrimination. *Id*. at 465-466. In presenting such evidence, a plaintiff is not permitted to rely solely on evidence that a jury could disbelieve the employer's proffered legitimate, non-discriminatory reason. *Lytle*, 458 Mich at 175-176. The plaintiff must present evidence, which may include the evidence

proffered in the initial stage of the burden shifting approach, that gender was a determining factor in the adverse employment decision. *Id*. at 178.

Plaintiff's gender discrimination claim suffers from the same deficiencies as her claim of racial discrimination. Plaintiff identifies only one incident when Gray used the term "bitch," and plaintiff acknowledges her own use of the term at work, signifying that use of the word was acceptable within "the plant environment." Further, Gray's statement was merely a stray remark under *Krohn v Sedgwick James of Mich, Inc*, 244 Mich App 289, 301-302; 624 NW2d 212 (2001). In reviewing a disputed remark, we consider (a) whether the remark was made by an individual involved in the termination decision, (b) whether the remark was made during the decision making process, (c) whether the remark was vague, ambiguous, or isolated, and (d) whether the remark was proximate in time to the termination. *Id.* at 292. Plaintiff testified that Gray made the remark on one occasion in May 2007, more than a year before plaintiff's termination. Further, Gray did not directly participate in the decision-making process regarding the selection of workers to be terminated in the reduction in work force. When viewed in the context of defendant's evidence showing the genders of production supervisors retained and terminated, there is no indication that defendant's method of selection was premised on gender or that plaintiff was terminated because of her gender. Therefore, the trial court should have granted defendant's motion for summary disposition on plaintiff's claim.

V. RETALIATION

To establish a prima facie case of retaliation under the CRA, a plaintiff must show "(1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action." *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 273; 696 NW2d 646 (2005), amended 473 Mich 1205 (2005) (citation omitted). Specifically, the anti-retaliation portion of the CRA prohibits discrimination or retaliation "against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act." MCL 37.2701(a). "To establish causation [when bringing a retaliation claim under the CRA], the plaintiff must show that his participation in activity protected by the CRA was a 'significant factor' in the employer's adverse employment action, not just that there was a causal link between the two." *Barrett v Kirtland Community College*, 245 Mich App 306, 315; 628 NW2d 63 (2001).

In accordance with the CRA, a protected activity involves "oppos[ing] a violation of th[e] act, or . . . mak[ing] a charge, fil[ing] a complaint, testif[ying], assist[ing], or participat[ing] in an investigation, proceeding, or hearing under th[e] act." MCL 37.2701(a); see also *Barrett*, 245 Mich App at 318. Because plaintiff admits that she did not file a complaint, or involve herself in an investigation or proceeding under the CRA, her claim of retaliation must be premised on her alleged opposition to a violation of the act. As this Court stated in *Barrett*, although "[a]n employee need not specifically cite the CRA when making a charge under the act [,] . . . [t]he employee must do more than generally assert unfair treatment." *Id.* at 318–319. "The employee's charge must clearly convey to an objective employer that the employee is raising the specter of a claim . . . pursuant to the CRA." *Id*. at 319. Here, plaintiff has failed to demonstrate

that she complained to management about anything other than generally unfair treatment. Even plaintiff's own witness, Veronica Kamm, the representative with whom plaintiff consulted through defendant's support services program, testified that plaintiff did not complain to her about discrimination or harassment. Because plaintiff's complaints cannot be construed as "clearly convey[ing] to . . . [the] employer . . . the specter of a claim . . . pursuant to the CRA," *Barrett*, 245 Mich App at 319, she failed to establish a claim of retaliation and the trial court should have dismissed it.

VI. FAILURE-TO-PROMOTE

In *Hazle*, 464 Mich at 467, our Supreme Court held that, to establish a prima facie case of failure-to-promote discrimination, a plaintiff was required to present admissible evidence that he or she: (1) belongs to a protected class, (2) suffered an adverse employment action, (3) was qualified for the position, and (4) the job was given to another person under circumstances giving rise to an inference of unlawful discrimination. After a plaintiff establishes a prima facie case of discrimination, the burden shifts to the defendant to articulate a non-discriminatory reason for the adverse employment action taken. *Id.* at 463-464. To prevail on the claim, a plaintiff must then present evidence that the explanation provided by his or her employer constituted a pretext for discrimination. *Id*. at 465-466.

Plaintiff's allegations are confused and inconsistent. Though plaintiff asserts that, on multiple occasions, she sought other positions at the company while working for defendant, she only submitted evidence of job listings posted in 2009, long after her termination. Contrary to plaintiff's contentions, testimony showed that most openings during her employment with defendant were filled by employees from closing facilities because they were given priority for hiring. While Winfield acknowledged that plaintiff was not specifically considered for promotion at meetings of the personnel development committee, plaintiff's assertion that her supervisor's recommendation was required for her promotion or transfer is not accurate. According to Winfield, any manager could have considered plaintiff for an open position. As Winfield testified:

> From a career planning perspective, we say that's a shared responsibility, and we say the first person who really drives their career is actually the employee, the P[ersonnel] D[evelopment] C[ommittee] rep[resentative], and whomever your supervisor manager is.

Winfield stated that employees could pursue promotions and lateral moves through defendant's on-line job posting system, and "that every employee has access to [that system] through our intranet." Winfield acknowledged, however, that an employee cannot simply randomly apply for listed openings but rather an employee "should have [the] concurrence" of their manager to initiate an application. Though plaintiff complains that she was not selected for a position or transfer, she does not allege she was precluded from applying. Further, Robert Webber testified that, to secure a promotion from plaintiff's grade level to the next grade level, defendant had employees develop "a manufacturing advisory evidence book" to compile "evidence" of their accomplishments and to "get[] themselves to that next level." Plaintiff does not suggest that she ever participated in or took advantage of this process. Plaintiff acknowledged she lacked any information or evidence regarding who made the decisions to promote certain employees or the

reasons for the promotions. Further, it is undisputed that, following the reduction in work force terminations, separated employees were not initially eligible for recall or rehire. While plaintiff asserts certain people have been rehired by defendant or were newly hired from outside the company following the reduction in work force, she does not identify or allege that she was qualified for the particular positions filled or that the decision to hire another person was premised on an improper motivation such as discrimination.

Simply stated, plaintiff has not supported her failure-to-promote claim with evidence to create a genuine issue of material fact. Specifically, plaintiff failed to show that she was qualified for any promotion or open position. Nor does plaintiff describe how the evidence she does proffer gives rise to an inference of discrimination. Therefore, the trial court should have granted summary disposition to defendant on plaintiff's failure to promote claim.

VII. DISPARATE PAY

In challenging defendant's alleged failure to remit equal pay, plaintiff also asserts discrimination premised on disparate treatment. Our Supreme Court has ruled that to create a rebuttable presumption of discrimination, a plaintiff is required to produce evidence that she "was (1) a member of a protected class, (2) subject to an adverse employment action, (3) qualified for the position, and that (4) others, similarly situated and outside the protected class, were unaffected by the employer's adverse conduct." *Town v Mich Bell Tel Co*, 455 Mich 688, 695; 568 NW2d 64 (1997). To establish a prima facie case of disparate treatment, a plaintiff must show that he or she was a member of a protected class and "was treated differently than persons of a different class for the same or similar conduct." *Meagher v Wayne State Univ*, 222 Mich App 700, 716; 565 NW2d 401 (1997). The term "similarly situated" has been defined to mean "'all of the relevant aspects' of his employment situation were 'nearly identical' to those of [other employees'] employment situation[s]." *Town*, 455 Mich at 699-700, citing *Pierce v Commonwealth Life Ins Co*, 40 F3d 796, 802 (CA 6, 1994). In other words, "all of the relevant aspects of [the person's] employment situation [are] nearly identical to those of plaintiff's situation." *Smith v Goodwill Indus of Western Mich, Inc*, 243 Mich App 438, 449; 622 NW2d 337 (2000) (citation omitted).

Though plaintiff asserts that she was systematically paid less than comparable Caucasian male employees, plaintiff had to establish an actionable pay decision and had to identify a similarly situated employee outside of her protected class who was treated differently. Plaintiff specifically names three white male production supervisors, within her same pay grade, as evidence of disparate pay. Specifically, plaintiff contends:

> Appellee Douglas earned $4,791.64 a month when she became a production supervisor Grade 6, in 2006 and was still a Grade 6 at the time of her termination, making $4,908.34. This salary pales in comparison to Joseph Closurdo, a white male, who became a production supervisor Grade 6, in 2006, earning a starting salary of $5,369.42; or Michael Piazza, a white male production supervisor Grade 6, in 2006, making $5,320.44; or Mark Cappaticio [sic], a white male production supervisor Grade 6, in 2006, making $5,499.82.

Defendant argues that these three employees are not similarly situated to plaintiff. Closurdo began his employment with defendant as an hourly employee. He is dissimilar to plaintiff because he had a background in production, received consistently higher performance review ratings, and obtained two promotions. His higher initial pay rate is explained by his qualification for a "supervisory differential" when transferring from an hourly position to a salaried position. Similarly, Piazza[1] also began as an hourly employee and was qualified to receive the supervisory differential when he was transferred to a salaried position, so he began his production supervisor position at a higher pay rate.

Notably, in the trial court, plaintiff named five employees in her disparate pay claim, Craig Olah, Donald Navigalo, Robert Budd, Mark Cappatocio, and Anthony Serra,[2] only one of whom, Cappatocio, she mentions on appeal. Defendant asserted that all of these employees were hired before plaintiff and had received annual pay increases before she was hired, which would explain, in part, the pay differential. Further, Cappatocio, Olah, and Budd began as hourly employees and qualified for the supervisory differential, which distinguishes their situations from plaintiff's. All of the employees plaintiff named also received consistently higher performance review ratings, which entitled them to higher pay increases. Other than asserting that the employees were all, at some point, grade level six production supervisors, plaintiff fails to submit any evidence that they "dealt with the same supervisor, [were] subject to the same standards and . . . engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." *Mitchell v Toledo Hosp*, 964 F2d 577, 583 (CA 6, 1992). As the court in *Pouncy v Prudential Ins Co*, 668 F2d 795, 803 (CA 5, 1982) observed, "[d]ifferent job levels, different skill levels, previous training, and experience: all may account for unequal salaries in an environment free of discrimination." Because plaintiff failed to demonstrate that the identified employees were similarly situated, the trial court erred when it denied defendant's motion for summary disposition on this issue.

Reversed.

/s/ Mark J. Cavanagh
/s/ Henry William Saad
/s/ Michael J. Riordan

[1] We note that Piazza was also terminated as a result of the reduction in work force.

[2] We assume that the Anthony Serra referenced is the same person who served as plaintiff's Manufacturing Planning Specialist when she began as a production supervisor.